UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ALEXA BEAN, on behalf of herself and others similarly situated,

Plaintiff,

vs.

1-800 CONTACTS, INC.,
Defendant.

Civil Action No. 16-5726

Judge: Hon. Anita B. Brody
Courtroom: 7-B

ORDER

AND NOW, on this ________ day of __________________, 2017, upon consideration of Defendant 1-800 Contacts, Inc.'s Motion to Transfer Venue to the District of Utah, and any response thereto, it is hereby ORDERED that the Motion is GRANTED. This action is hereby transferred to the United States District Court for the District of Utah.

____
Hon. Anita B. Brody, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ALEXA BEAN, on behalf of herself and others similarly situated, Plaintiff, vs. 1-800 CONTACTS, INC., Defendant.	Civil Action No. 16-5726 Judge: Hon. Anita B. Brody Courtroom: 7-B

DEFENDANT 1-800 CONTACTS, INC.'S
MOTION TO TRANSFER VENUE TO THE DISTRICT OF UTAH

Defendant 1-800 Contacts, Inc. ("1-800 Contacts"), by and through its undersigned counsel, hereby moves this Court to transfer this action to the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1404(a). In support of its Motion, 1-800 Contacts relies on its accompanying Memorandum, supporting Declarations, and Request for Judicial Notice, which are incorporated herein by reference.

Dated: December 16, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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Defendant.

Civil Action No. 16-5726

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1-800 CONTACTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO TRANSFER VENUE TO THE DISTRICT OF UTAH

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I. INTRODUCTION

This action is the third overlapping putative class action filed against Defendant 1-800 Contacts, Inc. ("1-800 Contacts"), a company headquartered in Utah. This case, like the others, challenges 1-800 Contacts' settlement of numerous trademark litigations brought in the District of Utah. Two other courts have granted 1-800 Contacts' motions to transfer the two previously filed class actions to that District, and both are now pending there. *See* Raphael Decl. Exs. 37, 39. This case belongs in the District of Utah as well. Not only are almost all of the witnesses and underlying events in Utah, but transfer will enable all cases to be litigated together: "Clearly, a single nationwide class action seems to be the best means of achieving judicial economy." Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1798.1 (3d ed.). Where "there is a strong likelihood of consolidation with a related action, a transfer of venue is warranted." *Villari Brandes & Kline, P.C. v. Plainfield Specialty Holdings II, Inc.*, No. 09-2552, 2009 WL 1845236, at *5 (E.D. Pa. June 26, 2009).

Plaintiff claims that 1-800 Contacts violated the federal antitrust laws by threatening, initiating, and settling trademark litigation against competing retailers that used the 1-800 Contacts trademark to buy advertising on search engines such as Google.[1] Plaintiff alleges that 1-800 Contacts' assertions of its trademark rights were "baseless" and the resulting settlements are anticompetitive. Plaintiffs in the actions that have been transferred to Utah assert the same antitrust claims based on the same allegations. And like Plaintiff here, plaintiffs in these Utah actions are 1-800 Contacts customers seeking to represent a putative class that includes all other 1-800 Contacts' customers. As detailed below, litigating the same claims by the same class in more than one court would lead to duplicative discovery, motion practice with the potential for inconsistent results and intractable preclusion questions, two bites at the class certification apple, and a race to judgment. *Cont'l Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1990) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent."). Transferring this action to the District of Utah for consolidation with the other actions that have been transferred would avoid this highly inefficient and unfair scenario.

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[1] Plaintiff also claims that 1-800 Contacts' conduct violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1, *et seq.*, and seeks to represent a Pennsylvania subclass of 1-800 Contacts' customers.

In addition, witness convenience, another "important factor," weighs heavily in favor of transfer as well. *Headon v. Colo. Boys Ranch*, No. Civ. A 204CV04847LDD, 2005 WL 1126962, at *7 (E.D. Pa. May 5, 2005). 1-800 Contacts, which was the plaintiff in the underlying trademark cases and is the defendant here, is headquartered in Utah. Compl. ¶ 12. Virtually all of the 1-800 Contacts personnel with the knowledge that 1-800 Contacts will need to defend itself against these allegations are in Utah, including at least eight former 1-800 Contacts employees who are now third parties beyond this Court's trial subpoena power. Lacey Decl. ¶ 4(a)-(h). In addition, most of the relevant documents are in Utah. *Id.* ¶ 2. One of the trademark defendants has its headquarters in Utah. Raphael Decl. Ex 23. And both 1-800 Contacts and other parties to the trademark litigations at issue retained Utah counsel, who are also beyond the Court's trial subpoena power. Raphael Decl. Exs. 1-14. Transferring this case to the District of Utah will enable 1-800 Contacts to present its defense at any trial through live testimony rather than by deposition and reduce the costs of this litigation for parties and third parties alike. 1-800 Contacts made the same arguments to the two courts that granted transfer.

No countervailing considerations tip the balance in this case against transfer. This case has no meaningful connection to this District. Plaintiff's residence in this District carries little weight because (1) she purports to represent a nationwide antitrust class of 1-800 Contacts customers, *Supco Automotive Parts, Inc. v. Triangle Auto Springs Co.*, 538 F. Supp. 1187, 1192 (E.D. Pa. 1982); and (2) this case's "center of gravity" concerns business practices by 1-800 Contacts in Utah, *Blender v. Sibley*, 396 F. Supp. 300, 302 (E.D. Pa. 1975).

Nor can Plaintiff avoid transfer by supplementing the federal antitrust claims she shares with the other plaintiffs with Pennsylvania claims based on the same conduct. Courts in this District have transferred Pennsylvania Unfair Trade Practices and Consumer Protection Law claims to other districts where, as here, the crux of the claims relate to actions that occurred outside of Pennsylvania. *See, e.g.*, *Kiker v. SmithKline Beecham Corp.*, 14-1445, 2014 WL 4948624 (E.D. Pa. Oct. 1, 2014); *Simmens v. Coca Cola Co.*, No. 07-668, 2007 WL 2007977, at *4 (E.D. Pa. July 5, 2007).

In short, given that two related actions are already pending in the District of Utah, this case's roots in litigation in that District, and the presence of numerous witnesses there, it would be more fair and convenient for the case to proceed in that District.[2]

II. BACKGROUND

A. 1-800 Contacts and Retail Contact Lens Sales

The defendant, 1-800 Contacts, has been a leader in lowering the retail price of contact lenses—the price consumers pay—for many years. As its name suggests, 1-800 Contacts began selling contact lenses over the phone, but now sells them over the Internet as well. Compl. ¶ 20.

[2] A fourth case, *Zimmerman v. 1-800 Contacts, Inc.*, was filed in this Court on December 13, 2016 and has been assigned to Your Honor. The claims and putative class asserted in that action overlap with those asserted by Plaintiff in this action, as well as those asserted in the other two actions. As such, unless the plaintiffs in *Zimmerman* agree to transfer, 1-800 Contacts anticipates moving to transfer that action to the District of Utah based on substantially similar grounds as those set forth in this motion.

1-800 Contacts' success invited competition, and today there are numerous other online retailers of contact lenses. Compl. ¶ 22.

Historically, however, eye care professionals ("ECPs")—ophthalmologists or optometrists—dominated retail sales of contact lenses, acting as sellers of the lenses only they can prescribe. As a result, ophthalmologists and optometrists wield enormous control over the prices they charge. And ECPs were reluctant to cooperate with third-party sellers like 1-800 Contacts. For example, ECPs were often unwilling to verify prescriptions for customers of these other sellers. H.R. REP. 108-318, at 4.

In 2003, to "increas[e] competition for the sale of contact lenses," Congress enacted the Fairness to Contact Lens Consumer Act, 15 U.S.C. § 7601 *et seq*., which requires ECPs to provide a copy of a patient's prescription and verify that prescription upon request by any other contact lens retailer. Congress predicted that giving third-party sellers the real ability to compete for sales would "promote[] competition, consumer choice, and lower prices." H.R. REP. 108-318, at 5. This prediction has come to pass, and many users of contact lenses now have their prescriptions filled by discount sellers of contact lenses, such as 1-800 Contacts. *See* Compl. ¶ 54.

B. 1-800 Contacts Filed and Settled Trademark Litigation in the District of Utah

Other companies have sought to profit from the fame of 1-800 Contacts' trademark by purchasing advertising that appears when consumers search for "1 800 Contacts" on search engines like Google. Beginning in 2004, 1-800 Contacts sent a series of cease-and-desist letters to online retailers threatening to sue them for trademark infringement for their purchases of search engine advertising based on 1-800 Contacts' trademarks. Compl. ¶ 24. Numerous lawsuits followed, all but one of which were in the District of Utah.[3] *See* Compl. ¶ 26.

Fourteen retailers ultimately settled 1-800 Contacts' trademark claims. Compl. ¶¶ 5, 29. In these settlement agreements, the defendant retailers agreed not to engage in the allegedly infringing conduct, *i.e.*, that they would not use 1-800 Contacts' trademarks to buy paid search advertising on search engines such as Google and Bing. Compl. ¶¶ 4-5, 29-31. 1-800 Contacts, in turn, agreed not to engage in similar conduct, *i.e.*, it would not use the defendant retailers' trademarks to buy paid search advertising. Compl. ¶ 32. 1-800 Contacts lost one case, which was litigated through summary judgment and appeal. Compl. ¶ 28; *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1181 (D. Utah 2010), *aff'd in part, rev'd in part*, 722 F.3d 1229 (10th Cir. 2013).

The central allegation of Plaintiff's complaint is that 1-800 Contacts' assertions of its trademark rights were baseless. Compl. ¶¶ 25-29, 34. Plaintiff's complaint omits, however, that two judges of the United States District Court for the District of Utah separately held that 1-800 Contacts' claims were "not baseless." *See 1-800Contacts, Inc. v. Mem'l Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, at *6 (D. Utah Mar. 15, 2010); *Lens.com v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS (D. Utah Mar. 3, 2014), ECF No. 91, at 2 (Raphael Decl. Ex. 16). And a third judge in that District recognized that 1-800 Contacts' suit "involve[d] an unsettled area of law given the emerging and changing nature of Internet competition." *1-800 Contacts, Inc. v. Lens.com, Inc.,* No. 2:07-CV-591 CW, 2012 WL 113812, at *3 (D. Utah Jan. 13, 2012), *aff'd*, 722 F.3d 1229 (10th Cir. 2013). Of note for purposes of this motion in particular, the just-cited *Lens.com* antitrust case was originally filed in the District of Nevada and that court transferred the case to the District of Utah. *Lens.com, Inc. v. 1-800 CONTACTS, Inc.*, 2012 WL 1155470 (D. Nev. Apr. 4, 2012).

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[3] The lone exception was a suit filed by 1-800 Contacts in the Southern District of New York alleging breach of a settlement agreement that resulted from litigation originally filed in that District by 1-800 Contacts. *See* Raphael Decl. Ex. 15.

C. Three Plaintiffs File Overlapping Class Actions Challenging the Trademark Settlements

Plaintiff's claims are virtually identical to those filed by two other putative classes that have been transferred to the District of Utah. All three putative classes assert claims for violations of the Sherman Act stemming from 1-800 Contacts' settlements of antitrust litigation in that District. The putative classes in all three cases include many of the same members.

1. Stillings Action

On September 21, 2016, *Stillings v. 1-800 Contacts, Inc.* ("Stillings Action") was filed in the Northern District of California. Raphael Decl. Ex. 38. Plaintiff in the Stillings Action asserts claims against 1-800 Contacts for violation of Section 1 of the Sherman Act on behalf of a putative nationwide class of 1-800 Contacts customers since 2012. *Id.* Plaintiff also asserts claims for violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act on behalf of a California subclass of the same purchasers. *Id.* Plaintiff's claims all stem from allegations that the trademark settlement agreements prohibiting other retailers from using 1-800 Contacts' trademarks to buy paid search advertising restrained competition in the market for contact lenses. *Id.*

On October 28, 2016, 1-800 Contacts moved to transfer the Stillings Action to the District of Utah, arguing, among other things, that transfer would be convenient and fair because the events underlying the litigation occurred there and the majority of witnesses with relevant knowledge live there. At a hearing on December 8, 2016, Judge James Donato of the Northern District of California granted 1-800 Contacts' motion and transferred the action to the District of Utah. Raphael Decl. Ex. 39-40.

2. Thompson Action

On October 13, 2016, *Thompson v. 1-800 Contacts, Inc.* ("Thompson Action") was filed against 1-800 Contacts, Vision Direct, Inc., and other unnamed online retailers in the Southern District of California. Raphael Decl. Ex. 36. Plaintiffs in the Thompson Action assert claims for violations of Sections 1 and 2 of the Sherman Act on behalf of a putative nationwide class of persons that purchased contact lenses over the Internet from 1-800 Contacts, Vision Direct, and other unnamed online retailers since 2004. *Id.* Plaintiffs also assert claims for violations of California's Cartwright Act and California's Unfair Competition Law on behalf of a California subclass of such purchasers. *Id.* Like in the Stillings Action, and here, the plaintiffs' claims in the Thompson Action are premised on allegations relating to 1-800 Contacts' trademark litigation and settlement agreements. *Id.*

On November 16, 2016, Plaintiffs in the Thompson Action and 1-800 Contacts jointly moved to transfer that action to the District of Utah. The parties explained that the transfer to the District of Utah was warranted because 1-800 Contacts is headquartered in Utah, numerous 1-800 Contacts' witnesses are located there, and the District of Utah has already adjudicated claims relating to the underlying trademark actions at issue. On November 21, 2016, Judge Larry Alan Burns of the Southern District of California granted the transfer motion and transferred the Thompson Action to the District of Utah. Raphael Decl. Ex. 37.

3. Bean Action

Plaintiff Bean filed the instant action in this District on November 2, 2016, asserting claims for violations of Section 1and 2 of the Sherman Act and unjust enrichment on behalf of a putative nationwide class of 1-800 Contacts customers since 2012. Compl. ¶¶ 82-139. Plaintiff also asserts a Pennsylvania UTPCPL claim on behalf of a putative subclass of Pennsylvania customers. *Id.* ¶¶ 140-50. All of the members of Plaintiff's putative nationwide class are also members of the putative classes in both the Thompson and Stillings Actions. And like plaintiffs in the Thompson and Stillings Actions, Plaintiff here alleges that 1-800 Contacts restrained trade in violation of the federal antitrust laws when it threatened and settled trademark litigation claims against other retailers of contact lenses that used 1-800 Contacts' trademarks to buy advertising on Internet search engines.

D. More than a Dozen Potential Witnesses Are in Utah

Plaintiff's case challenges litigation in the District of Utah and settlements entered into by 1-800 Contacts, a company headquartered in Utah. Not surprisingly, more than a dozen witnesses to these events work and reside in Utah. At least eight witnesses are former 1-800 Contacts employees, including the company's former:

- Online Acquisition Manager responsible for managing 1-800 Contacts' Internet marketing team;
- Senior Marketing Manager; Associate Director of Marketing; Senior Manager, Search Marketing; and Search Marketing Associate;
- Vice-President, E-Commerce; and
- General Counsel and Associate General Counsel.

Lacey Decl. ¶ 4(a)-(h); Raphael Decl. ¶¶ 2-4. In addition, the company's current CEO, Chief Marketing Officer, Marketing Director, Senior Marketing Manager, Search Marketing Analyst, and Vice President of Digital Commerce all work and reside in Utah. Lacey Decl. ¶ 3.

Other potential witnesses also are in Utah. Standard Optical, one of the trademark defendants, has its headquarters in Utah. Raphael Decl. Ex. 23. 1-800 Contacts' outside counsel in its underlying trademark litigations work in the Salt Lake City office of Holland & Knight

LLP. Raphael Decl. ¶ 5, Exs. 1-14. And in a number of cases, the trademark defendants' outside counsel in the underlying trademark litigations are in Utah as well. Raphael Decl. Exs. 7, 10, 13.

E. This Case Has Only Minimal Connections to This District

This case's only meaningful connection to this District is Plaintiff's residence in Pennsylvania. Compl. ¶ 11. No significant events at issue took place in this District. Only one of the trademark defendants, Web Eye Care, is located in this District. Raphael Decl. Ex. 28. The other trademark defendants and other major contact lens retailers have their headquarters in Utah, Washington, Arkansas, Illinois, Missouri, New York, Ohio, Texas, Wyoming, and Canada. Raphael Decl. Exs. 17-27, 29-35.

III. ARGUMENT

A. Venue is Proper in Both Districts

Under Section 1404(a), a court "may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The District of Utah is a proper venue for this case for at least two reasons. *First*, "[a] civil action may be brought" in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(b)(1). A corporate defendant resides wherever it "is subject to the court's personal jurisdiction." 28 U.S.C. § 1391(c)(2). Venue therefore is proper in the District of Utah where 1-800 Contacts has its "home." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011); *see also* Compl. ¶ 12 (alleging that 1-800 Contacts maintains its principal place of business in Utah).

Second, venue also lies in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). Venue in the District of Utah would be proper on that basis as well because Plaintiff's claims challenge assertions of trademark rights and settlements negotiated in Utah for litigation that was pending in Utah, in some cases with the involvement of Utah counsel.

B. This Case Belongs in Utah

Section 1404 "reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). "[S]ection 1404(a) was intended to vest district courts with broad discretion to determine, on an individualized, case-by-case basis, whether convenience and fairness considerations weigh in favor of transfer." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 883 (3d Cir. 1995). The Third Circuit in *Jumara* set forth a number of relevant factors for courts to consider, including practical considerations that "could make the trial easy, expeditious, or inexpensive." *Id.* at 879. As demonstrated below, the District of Utah is the most efficient forum for this case and the balance of factors weighs strongly in favor of transfer to that District.

1. Transfer Will Avoid Duplicative Litigation

As explained, two nearly identical cases brought on behalf of almost identical putative classes were transferred to the District of Utah and are pending there. Raphael Decl. Ex 37, 39. The only fair and efficient means of litigating those cases and this one is to transfer this case to the District of Utah as well so all three cases can be consolidated and tried together. *Cont'l Grain*, 364 U.S. at 26; *see also* Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1798.1; Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461, 470-497 (2000) ("whenever two or more suits are pending between the same parties on the same claim, a number of resources are wasted.”).

“The presence of related cases in the transferee forum is a strong factor in favor of transfer.” *Simmens,* 2007 WL 2007977, at *2; *see also Palagano v. NVIDIA Corp.*, No. 15-1248, 2015 WL 5025469, at *5 (E.D. Pa. Aug. 25, 2015) (transferring venue to Northern District of California where related putative class actions were pending); *Villari Brandes & Kline, P.C.*, 2009 WL 1845236, at *5; *Weber v. Basic Comfort Inc.*, 155 F. Supp. 2d 283, 286 (E.D. Pa. 2001) (transferring venue to District of Colorado so that related cases could be litigated together in the same district). In fact, “this factor alone is sufficient to warrant a transfer,” even when other factors weigh in favor of denial (which is not the case here). *Simmens*, 2007 WL 2007977, at *2 (citation and quotation marks omitted); *see also Weber*, 155 F. Supp. 2d at 286 (“This consideration is powerful enough to tilt the balance in favor of transfer even when the convenience of the parties and witnesses would suggest the opposite.”).

This case illustrates that the “strong policy favoring the litigation of related claims before the same tribunal” exists for good reason. *Thompson v. Global Mktg. Research Servs., Inc.*, No. 15-3576, 2016 WL 233702, at *5 (E.D. Pa. Jan. 20, 2016) (citation and quotation marks omitted). *First*, the prospect of multiple overlapping class actions portends duplicative discovery requiring 1-800 Contacts and third parties to collect and produce documents, respond to written discovery, and sit for depositions at least twice rather than once. Consolidation would mean that “pre-trial discovery can be conducted more efficiently” and “witnesses can be saved the time and expense of appearing in more than one tribunal.’ *Id.*; *see also* Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. at 483 (noting that “non-party witnesses are forced to endure the inconvenience of multiple depositions, multiple subpoenas seeking the same documents and multiple trials").

Second, litigating the same claims in two different courts presents a serious risk of inconsistent judgments. *Ayling v. Travelers Property Cas. Corp.*, No. 99-3243, 1999 WL 994403, at *4 (E.D. Pa. Oct. 28, 1999). If this putative class action is not consolidated with the others, one court could grant a motion to dismiss or summary judgment while another court could deny the same motion, creating serious problems about which rulings bind the class. Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1798.1 (dueling class actions "increase the risk of disparate verdicts raising serious questions of fairness"). *Cf.* Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. at 484 (noting that "preclusion issues are more complex and time-consuming" in dueling class actions). By consolidating this case with the other previously transferred class actions, "inconsistent results can be avoided." *Thompson*, 2016 WL 233702, at *5.

Third, the potential for inconsistent results is particularly unfair in class actions because an order of one court denying class certification generally does not preclude another putative plaintiff from asking another court to certify the same class. The Supreme Court has expressly noted that "federal courts may consolidate multiple overlapping suits against a single defendant in one court" to avoid this unfairness. *Smith v. Bayer Corp.*, 564 U.S. 299, 317 (2011).

In short, transferring the related action to the district where related claims are pending "will potentially result in more streamlined discovery and a more efficient resolution of claims." *Thompson*, 2016 WL 233702, at *5.

2. Witness Convenience Strongly Supports Transfer

The convenience of witnesses is another important factor in the transfer analysis. *See Headon,* 2005 WL 1126962, at *6; *cf. Denver & Rio Grande W. R.R. Co. v. Bhd. of R.R.*

Trainmen, 387 U.S. 556, 560 (1967) ("[V]enue is primarily a matter of convenience of litigants and witnesses."). This factor weighs strongly in favor of transfer as well.

"[T]he convenience of key nonparty witnesses and, more importantly, the ability to compel them to testify in person at trial, is the main focus of this factor." *Kiker*, 2014 WL 4948624, at *7. That is because "live testimony is preferred over deposition testimony." *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liability Litig.*, No. 12-20002, 2013 WL 3242717, at *3 (E.D. Pa. June 26, 2013); *see also Jumara*, 55 F.3d at 879 (identifying "convenience of the witnesses . . . to the extent that the witnesses may actually be unavailable for trial in one of the fora" as one factor in the transfer analysis); *Synthes, Inc. v. Knapp*, 978 F. Supp. 2d 450, 462 (E.D. Pa. 2013) (concluding that availability of compulsory process over non-party factual witnesses in transferor district weighed in favor of transfer); *Copley v. Wyeth, Inc.*, No. 09-722, 2009 WL 2160640, at *5 (E.D. Pa. July 17, 2009).[4]

Numerous 1-800 Contacts witnesses beyond the Court's trial subpoena power include former employees with responsibility for paid search advertising, 1-800 Contacts' website, marketing, pricing, advertising, litigation and legal affairs, Lacey Decl. ¶ 4(a)-(h), as well as trademark counsel involved in the litigations at issue. Raphael Decl. Exs. 1-14. In contrast, there are no 1-800 Contacts witnesses with potentially relevant information who reside within the Court's subpoena power. Lacey Decl. ¶ 5.[5] Accordingly, transfer to the District of Utah would enable 1-800 Contacts to present its defense through live testimony rather than through videotaped depositions. Indeed, before any of the three currently pending actions challenging 1-800 Contacts' trademark settlements were filed, another court transferred to the District of Utah an antitrust case alleging that 1-800 Contacts engaged in objectively baseless trademark litigation largely based on the presence of numerous witnesses in Utah. *Lens.com, Inc.*, 2012 WL 1155470, at *4.

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[4] *Cf. Worldwide Fin. LLP v. Kopko*, No. 1:03-CV-0428-DFH, 2004 WL 771219, at *3 (S.D. Ind. Mar. 18, 2004) ("[T]he principal concern along these lines is to make non-party witnesses available for trial. The aim is to minimize the risk of 'trial by deposition.'").

[5] One of the trademark defendants, Standard Optical, has its headquarters in Utah and would also be beyond this Court's subpoena power. Raphael Decl. Ex. 23. Thus, the District of Utah would also be more convenient for witnesses from that company. Another of the trademark defendants, Web Eye Care, has its headquarters in Pennsylvania. Raphael Decl. Ex. 28.

The presence of witnesses in Utah also means that transfer to Utah would reduce the costs of litigation. *See Jumara*, 55 F.3d at 879 (identifying making trial "easy, expeditious, or inexpensive" as a practical consideration in the transfer analysis). A Utah forum would minimize the travel costs and disruption to the many witnesses who live and work there, including both current and former 1-800 Contacts employees. *See Ramiccio v. New Jersey Transit Rail Operations, Inc.*, No. Civ. A. 96-6772, 1997 WL 230791, at *2 (E.D. Pa. Apr. 30, 1997) (granting transfer to the District of New Jersey based, in part, on the fact that "transfer would greatly reduce the cost and burden of transporting witnesses because virtually every witness to the facts lives in northern New Jersey").

3. Utah Is This Case's Center of Gravity

Transfer also is warranted because Utah is this case's "center of gravity." *Blender*, 396 F. Supp. at 302. "Typically the most appropriate venue is where a majority of the events giving rise to the claim arose." *In re Amkor Tec., Inc. Sec. Litig.*, No. 06-298, 2006 WL 3857488, at *5 (E.D. Pa. Dec. 28, 2006); *see also Jumara*, 55 F.3d at 879 (identifying "whether the claim arose elsewhere" as a factor to consider in the transfer analysis). "Where plaintiff's cause of action arises from strategic policy decisions of a defendant corporation, the defendant's headquarters can be considered the place where events giving rise to the claim occurred." *Ayling*, 1999 WL 994403, at *5. 1-800 Contacts has its headquarters in Utah. Accordingly, Utah is where 1-800

Contacts developed its trademarks, made decisions as to when and how to assert those trademarks, and eventually asserted its trademarks.

Utah also is where 1-800 Contacts filed suit to protect its intellectual property and where the relevant agreements were negotiated and executed by 1-800 Contacts employees and the company's Utah counsel. Courts have transferred antitrust cases challenging settlements of intellectual property litigation to the District where the litigation was filed and settled. *Watson Pharm., Inc.*, 611 F. Supp. 2d 1081 (C.D. Cal. 2009); *Stephen L. LaFrance Pharmacy, Inc.*, Nos. 09-1507, 09-1856, 09-1900, 2009 WL 3230206 (D.N.J. Sept. 30, 2009). In these cases, private class plaintiffs (and the FTC) filed antitrust cases in California and New Jersey respectively, alleging that the defendant, a company headquartered in Georgia, filed sham patent litigation in the Northern District of Georgia and/or entered into anticompetitive settlements. Noting that (1) there was "no way" to litigate the antitrust case "without re-opening an inquiry into the merits of the Georgia suits," (2) that the judge in the Northern District of Georgia was "familiar with the details of the underlying patent litigation," and (3) that the challenged settlement agreements "were negotiated and executed in Georgia," the courts transferred the cases to the Northern District of Georgia. *Watson*, 611 F. Supp. 2d at 1088-89; *see also Stephen L. LaFrance Pharmacy, Inc.*, 2009 WL 3230206, at *5 ("events surrounding the settlements, the witnesses, and sources of proof" were "concentrated in the Northern District of Georgia").

Just so here. Plaintiff's claims challenge the merits of 1-800 Contacts' trademark litigation in the District of Utah. Courts in that District have ruled on some of those underlying trademark cases. 1-800 Contacts employees at the company's headquarters in Utah were responsible for the company's decision to file and settle the litigations as well as for implementing the settlement agreements at issue, Lacey Decl. ¶ 4(g)-(h). *Gen. Fiber Comm.,* *Inc. v. Barnes Wentworth, Inc.*, No. 03-cv-3291, 2004 WL 1636980, at *2 (E.D. Pa. May 28, 2004) (ordering transfer out of plaintiff's home forum where "most, if not all, of the events giving rise to the Complaint" took place in another district).

By contrast, this case's only connection to this District is that the named plaintiff resides here, Compl. ¶¶ 11, 54, and one of 14 trademark defendants was headquartered in this District. None of the 1-800 Contacts employees responsible for the trademark litigations, settlement agreements or advertisements at issue worked in this District in the relevant time period. Accordingly, this case's center of gravity is in Utah, not in this District, which weighs further in favor of transfer.

4. The District of Utah is Familiar With the Applicable Law

Plaintiff's state law claims under Pennsylvania law do not weigh against transfer. While this Court likely is more familiar with Pennsylvania law than the District of Utah, a district court in one state is "more than capable of applying another state's law." *Wagner v. Olympus Am., Inc.*, 15-6246, 2016 WL 3000880, at *7 (E.D. Pa. May 25, 2016) (citation and internal quotation marks omitted); *cf. Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 584 (2013) ("[F]ederal judges routinely apply the law of a State other than the State in which they sit."). In similar cases in which plaintiffs sought to represent a nationwide class and also asserted UTPCPL claims on behalf of a putative Pennsylvania subclass, this District has explained that the presence of the UTPCPL claim alone did not weigh against transfer. *See Simmens*, 2007 WL 2007977, at *4. Indeed, UTPCPL claims are frequently heard and adjudicated in district courts outside of Pennsylvania.[6]

[6] *See, e.g.*, *Chapman v. Tristar Prods.*, No. 16-cv-1114, 2016 WL 6216135 (N.D. Ohio Oct. 25, 2016); *In re Opana ER Antitrust Litig.*, Case No. 14 C 10150, 2016 WL 4345516 (N.D. Ill. Aug.

In fact, transfer is proper because the District of Utah is "already familiar with the factual and legal issues." *Ayling*, 1999 WL 994403, at *4. Plaintiff alleges that 1-800 Contacts' trademark litigations were objectively baseless. But two courts in the District of Utah have rejected antitrust claims alleging that these same trademark litigations were objectively baseless. *See Mem'l Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, at *6 ("the Court finds that [1-800 Contacts'] claim is not baseless"); *Lens.com*, No. 2:12CV00352 DS, ECF No. 91, at 2 (Raphael Decl. Ex. 16) ("the underlying action was not baseless"). Accordingly, transferring this case to the District of Utah would "conserve judicial resources." *Watson Pharm., Inc.*, 611 F. Supp. 2d at 1088 (transferring antitrust case challenging patent litigation and settlements to district where litigations were filed); *Lens.com, Inc. v. 1-800 CONTACTS, Inc.*, 2012 WL 1155470, at *6 ("[J]udicial economy supports transfer at least somewhat because the Utah courts are familiar with the underlying fact of this case.").

5. Plaintiff's Choice of Forum is Not Entitled to Deference

Plaintiff's choice of forum is not entitled to significant weight here for three reasons.

First, Plaintiff has pled a nationwide class action potentially consisting of many thousands of people across the country. Where "the plaintiff seeks to represent a class of many potential plaintiffs scattered across the country, plaintiff's choice of forum deserves less weight." *Supco*, 538 F. Supp. at 1192. As the Supreme Court has explained, "where there are hundreds of potential plaintiffs . . . all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518,

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11, 2016); *Knox v. Vanguard Grp. Inc.*, No. 15-13411-FDS, 2016 WL 1735812 (D. Mass. May 2, 2016); *In re General Motors Corp.*, No. MDL 04-1600, 2005 WL 1924354 (W.D. Okla. Aug. 8, 2005); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F. Supp. 2d 160 (D. Me. 2004).

524 (1947).

Second, Plaintiff's decision to file in this District is entitled to little weight where the forum has little or no connection to the case: A plaintiff's choice of forum is given "less deference where that forum has little connection to the operative facts of the lawsuit." *Bolick Distributors Corp. v. Armstrong Holdings, Inc.*, No. Civ. A. 02-5135, 2003 WL 21500558, at *6 (E.D. Pa. May 16, 2003) (citation and internal quotation marks omitted); *see also Synthes*, 978 F. Supp. 2d at 459; *Rowles v. Hammermill Paper Co.*, 689 F. Supp. 494, 496 (E.D. Pa. 1988) ("[P]laintiff's choice of forum merits less deference when none of the conduct complained of occurred in plaintiff's selected forum."). As noted, the core of this case consists of 1-800 Contacts' litigation, settlement agreements, and advertisements, all of which were carried out by 1-800 Contacts employees and counsel in Utah, not in this District.

Third, and finally, Plaintiff's choice of forum is entitled to less deference where, as here, "a related action is pending in another forum." *Synthes, Inc.*, 978 F. Supp. 2d at 459.

The lack of deference owed to Plaintiff's choice of forum further tilts the balance in favor of transfer. *See Chrysler Capital Corp. v. Woehling*, 663 F. Supp. 478, 482 (D. Del. 1987) (Where plaintiff's choice of forum is entitled to little deference, "the burden on the defendant is reduced and it is easier for the defendant to show that the balance of convenience favors transfer.").

6. Time to Trial Cannot Override the Other Factors Favoring Transfer

Average time to trial in the District of Utah is longer than in this District. But this is "not a factor of great importance in [a § 1404(a)] motion." *Ayling*, 1999 WL 99403, at *5. Accordingly, it should be entitled to little weight. *Id.*

IV. CONCLUSION

This case should be transferred to the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1404(a).

Dated: December 16, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of December 2016 the foregoing Motion to Transfer Venue to District of Utah, with supporting Memorandum, Declarations, and Request for Judicial Notice, was filed with the United States District Court for the Eastern District of Pennsylvania using the ECF system. This document is available for reviewing and download.

/s/ *Todd N. Hutchison*
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